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No. 96-1721

In The

Supreme Court of the United States

October Term, 1996

CITIZEN POTAWATOMI NATION,

Petitioner,

vs.

C & L ENTERPRISES, INC.,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

C&L Enterprises, Inc., ("C&L"), Respondent, having filed a brief in opposition to the petition for writ of certiorari and having raised therein points not contained in the petition, the Citizen Potawatomi Nation ("Potawatomi"), Petitioner, submits the following reply.

ARGUMENT

The Potawatomi petition seeks review of the holding by the Oklahoma Supreme Court that a "contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country."[1] In responding, C&L has completely ignored the only issue (tribal suit immunity) and the relevant case law. In opposing the petition for certiorari, C&L makes three arguments: (1) that the Oklahoma Supreme Court in rejecting tribal suit immunity was acting consistent with *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); (2) that the Oklahoma Supreme Court had an alternative basis for finding jurisdiction over an Indian tribe,[2] to-wit: an arbitration clause in the contract; and (3) the Potawatomi did not timely and properly raise the applicability of 25 U.S.C. § 81. None of these issues was

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[1] *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59, 62 (Okla. 1995).

[2] Although C&L consistently argued that the arbitration clause was a jurisdictional waiver, no forum (the arbitrator, the district court, or the Court of Appeals) ruled that the arbitration clause was a waiver of tribal suit immunity.

briefed by the Potawatomi.[3] As explained hereafter, the three new issues raised by C&L do not diminish in any material respect the reasons originally proffered by the Potawatomi in favor of granting certiorari.

Reply to C&L Proposition No. 1

The language quoted by C&L from *Organized Village of Kake*[4] arose in a context considerably different from that at issue here. *Organized Village of Kake* and the other case cited by C&L[5] were suits *initiated* by Indian tribes against states where the tribes were acting within the states' territorial jurisdictions, but resisting compliance with state statutes.[6] Neither *Organized Village of Kake* nor *Mescalero Apache Tribe* held that Indian tribes waive sovereign immunity from suit. The limitation on tribal sovereignty recognized by these cases is that when Indian

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[3] The Potawatomi did discuss the applicability of Section 81, [*See* Pet. at 18, 20-21], noted where the issue had been raised [Pet. at 6, n.6], but did not directly discuss whether the issue was timely or properly raised.

[4] "State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation." *Organized Village of Kake*, 369 U.S. at 75.

[5] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

[6] In *Organized Village of Kake*, a tribe sued Alaska (where Indian jurisprudence is unique in any event) to enjoin enforcement of state fishing regulations against tribal members. *Organized Village of Kake*, 369 U.S. at 61. The relief was denied. In *Mescalero Apache*, an Indian tribe sued a state for certain taxes assessed in relation to a ski resort operated by the tribe off the reservation. *Mescalero Apache*, 411 U.S. at 146. The imposition of state income and gross receipts taxes was upheld, but a state use tax was enjoined.

tribes operate within state jurisdictional areas they are "subject to nondiscriminatory state law" unless exempted by federal statutory law. *Mescalero Apache Tribe*, 411 U.S. at 148-49. These cases do not hold that Indian tribes can be sued in state courts by a third party without an explicit waiver of suit immunity. In fact, another case cited by C&L involved the Potawatomi[7] and described the distinctions ignored by C&L. In *Potawatomi*, this Court held that the State of Oklahoma's statutory requirement to collect cigarette taxes applies to the Potawatomi when selling to non-tribal members,[8] but that "[t]here is no doubt that sovereign immunity bars" Oklahoma from bringing suit against the Potawatomi for failure to collect the taxes.[9] Discussing *Hoover* and *Oklahoma Tax Commission v. Potawatomi*, an Oklahoma Justice recently remarked:

> It is strange, to say the least, that this Court gives Aircraft Equipment Co., as a judgment creditor, a remedy against an Indian tribe which the United States Supreme Court says the State of Oklahoma, as a judgment creditor, would not have and could not use against an Indian tribe.

Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma, No. 86,184, 1997 WL 222406, at *6, ¶ 3 (Okla. May 6, 1997) (Summers, V.C.J., dissenting, with whom Kauger, C.J., joins).

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[7] *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

[8] *Id.* at 512.

[9] *Id.* at 514.

The other authorities cited by C&L in support of its first proposition are not federal decisions but rather state decisions where state courts other than Oklahoma have sought to impose their will on Indian commerce regardless of federal law. None are germane to this petition.

The cases cited by the Potawatomi in the petition to which C&L has not responded are consistent with 200 years of history, to-wit: state courts do not have jurisdiction over Indian tribes absent a clear and unequivocal waiver of sovereign suit immunity.

Reply to C&L Proposition No. 2

C&L's second proposition is an attempt to bootstrap an arbitration clause into a waiver of sovereign immunity clause. This argument would strip the words "clear" and "unequivocal" of any meaning and is contrary to holdings by this Court that a waiver cannot be inferred. At a minimum, a clear and unequivocal waiver of sovereign suit immunity would include the words "waiver" and "suit immunity" and be in a clause labeled "waiver," not in a clause labeled "Administration of the Contract."[10]

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[10] Arbitration is discussed in paragraph 10.8. [App. 36] of article 10 ("Administration of the Contract"). App. 36. C&L admits that the agreement at issue here is a form contract copyrighted by the American Institute of Architects ("AIA") in 1987, but then implies that the critical terms in the contract (the arbitration paragraph) were drafted by the Potawatomi. This is not accurate. The arbitration paragraph, one of many paragraphs in one of 20 articles, is part of the standard form contract copyrighted by the AIA. Under C&L's construction of this form contract that was not tailored in any way for an Indian tribe, the arbitration paragraph compels arbitration of disputes

C&L states that the Potawatomi had no immunity because the contract "was – without dispute – executed outside of Indian country." Resp't Br. at 4. This assertion is not accurate nor supported by the record. No party ever performed under C&L's putative contract. *No* activity ever occurred. The record does not reflect where any of the signatories were located at the time that they affixed their names to the document. In any event, the place of the signing of the document is immaterial. What is important is whether or not those putatively signing for the tribe had been empowered by the tribe to waive sovereign immunity and whether they exercised that power in clear and unequivocal terms. An arbitration paragraph cannot be construed as a waiver of sovereign Indian immunity without doing violence to the holdings of the United States Supreme Court. Subjecting a sovereign entity to suit without its consent necessarily interferes with the sovereign's ability to manage its own affairs and maintain control over its public funds, territories, and peoples. As the Supreme Court has observed, a tribes's immunity from suit "is a necessary corollary to Indian sovereignty and self-governance. * * * tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986).

Again, as authority for this argument, C&L principally relies on state cases[11] that misconstrued a Ninth

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when signed by a non-Indian, but compels arbitration of disputes *and* waives tribal suit immunity when signed by an Indian tribe.

[11] Alaska [*Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983)] and Arizona [*Val/Del, Inc. v. Superior Court*,

Circuit case to reach a result that, as the Ninth Circuit subsequently held, is inconsistent with federal law. The Ninth Circuit decision[12] held that an Indian tribe waives suit immunity "by intervening as a party plaintiff and subsequently entering into a fishing conservation agreement which provided, among other things, that the parties to the agreement would submit all future disputes to the Oregon district court for resolution."[13] The Ninth Circuit later recognized that state courts (Alaska and Arizona)[14] had misconstrued their pronouncement on arbitration clauses and reiterated that waivers of suit immunity cannot be implied but must be clear and unequivocal. A finding that an arbitration clause is a waiver of tribal sovereignty "runs counter to not only the strong presumption against tribal waivers of immunity, but also generally accepted principles governing the interpretation of contractual arbitration provisions." *Id.* at 419. Because of the "strong presumption against waivers of tribal sovereign immunity," the Ninth Circuit refused

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703 P.2d 502 (Ariz. App. 1985)]. C&L also cites two federal cases: *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995) and *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656 (7th Cir. 1996). The *Rosebud* panel relied on *Native Village of Eyak* without mentioning the Ninth Circuit decisions. *Rosebud*, 50 F.3d at 562. The *Sokaogon* panel simply rejected the Supreme Court requirement for an explicit waiver. *Sokaogon*, 86 F.3d at 659-60 ("[We] doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit.").

[12] *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981).

[13] *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

[14] *Id.* at 419-20.

"to imply a waiver of sovereign immunity * * * by entering into * * * [an] arbitration clause." *Id.* at 420. Nothing remotely similar occurred here. The Potawatomi have consistently and unmistakenly asserted their sovereign immunity to the arbitrator, to the state district court, and to the state appellate courts. They have never intervened in any litigation.

In any event, these state cases cannot overrule United States Supreme Court decisions holding that "[i]t is settled that a waiver of sovereign immunity ' "cannot be implied but must be unequivocally expressed." ' *United States v. Testan*, 424 U.S. 392, 399, 47 L.Ed.2d 114, 96 S.Ct. 948 (1976), quoting, *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969)." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

C&L argues that a form arbitration clause – that does not mention tribal sovereign immunity nor "waiver" – is the clear and unequivocal waiver of sovereign immunity required by the United States Supreme Court. If so, the words "clear" and "unequivocal" cease to have any meaning. An "arbitration clause" is an "arbitration clause," not a "*waiver* clause." No waiver of suit immunity is expressed in the arbitration paragraph. Thus, any argument of waiver must arise by an inference from the arbitration paragraph. Inferring waiver of tribal sovereignty has clearly been rejected by the United States Supreme Court. The phrase "unequivocally expressed" can have no meaning if a standard form arbitration clause that neither mentions Indian tribes, suit immunity, or waiver is considered to be an "unequivocally expressed" waiver of tribal suit immunity.

Reply to C&L Proposition No. 3

Assuming *arguendo* its validity, the arbitration-is-waiver argument is trumped by the fact that the contract itself and every term in it (including the arbitration paragraph) is "null and void" because not approved as required by 25 U.S.C. § 81. To avoid the consequences of § 81, C&L makes a series of arguments addressed hereafter *seriatim*.

First, C&L implies that arbitration clauses survive even an invalid contract. Resp't Br. at 17 citing *Sokaogon* at 659. Thus, C&L is arguing that an arbitration paragraph in a contract not only compels arbitration and, when signed by an Indian tribe, waives tribal suit immunity, it has a life of its own independent of the contract itself! If the contract is void, what is arbitrated? These super-contractual attributes claimed for a simple arbitration paragraph offend common sense, are not consistent with contract law nor with the typographical emphasis usually accorded waivers of rights in a contract.[15]

Second, C&L states that:

> Petitioner did not timely and properly raise the federal issue of the applicability of 25 U.S.C. § 81 (1958) before the District Court. Rather, Petitioner relegated same to a single footnote which alleges application of the statute in a purely conclusive manner without any mention

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[15] Here the arbitration paragraph was indistinguishable from other paragraphs in the form agreement. Many jurisdictions require that significant terms in a contract be more conspicuously displayed than other terms. *See e.g.* 15 U.S.C. § 1632; 14A O.S.1991, § 2-302, ¶ (2). *Compare* App. 22.

> of its essential elements or any factual basis for the District Court to determine its application.

Resp't Br. at 4. This statement ignores C&L's own petition which includes allegations that the alleged contract was to construct a roof on a building and on land owned by an Indian tribe. *See* App. 18-19, ¶¶ 1, 4. C&L's own allegations provided the "factual basis for the District Court to determine" the application of § 81. C&L claims that the § 81 issue was not timely asserted even though the Potawatomi advised the arbitrator[16] of § 81 and, as C&L notes, the Potawatomi raised the issue in the first pleading they filed in the State District Court. *See* Pet. at. 6, n.6.

Third, C&L argues that Section 81 does not apply because four factors discussed in a Ninth Circuit case are not present.[17] These four factors and the cases cited have no application to the circumstances here. These factors were discussed in "determining whether a management contract [with an Indian tribe] is relative to Indian lands."[18] A contract to construct a roof on a building affixed to Indian lands is not a management contract but is clearly "relative to their lands."

Fourth, C&L argues that the Section 81 phrase "their lands" refers only to "reservation or trust land." This

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[16] *See* Pet. at 5.

[17] Resp't Br. at 18-19. "*See Mission Indians v. American Management Amusement*, 840 F.2d 1394 (9th Cir. 1988) * * * ; *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993)."

[18] *In re U.S. ex rel Hall*, 825 F.Supp. 1422, 1433 (D.Minn. 1993).

argument is succinctly rejected in *Narragansett Indian Tribe v. Ribo, Inc.*, 686 F.Supp. 48, 51 (D.R.I. 1988):

> Defendants contend that 25 U.S.C. § 81 pertains only to "tribal land" which they define as being limited to land that is part of the tribe's reservation. However, they have cited no authority in support of that interpretation. Moreover, such a construction appears to be at variance with both the plain language of the statute and with its broad remedial purpose. Thus, the statute uses the term "their [the Indians'] lands" without differentiating between original tribal lands and those subsequently acquired. Reading into those words the limitation urged by Defendants would distort their plain meaning. Moreover, it also would emasculate the statute and frustrate its purpose by providing a mechanism to regulate Indian land transactions. Indeed, it has been said that the Indian Non-intercourse Act, 25 U.S.C.A. § 177, a statute having a similar objective, applies to lands acquired by tribes through purchase as well as through other means. *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958).

Fifth, C&L states that "the purpose underlying 25 U.S.C. § 81 is not related to disposition of Indian lands." Resp't Br. at 19. This is patent nonsense. Section 81 makes any contract with an Indian tribe "relative to their lands" null and void unless properly endorsed by the Secretary of the Interior. The *primary purpose* of § 81 *is* to protect the lands of Indians and Indian tribes.

Finally, C&L states that it consistently alleged "that some or all of the funds used for construction of the bank and its roof were non-tribal funds * * * . At no time has Petitioner denied this and therefore this allegation has been admitted and determined in the proceeding below." Resp't Br. at 21-22. This assertion is not true. C&L made this allegation in its petition. The Potawatomi never answered the petition because of the jurisdictional challenge. When C&L raised this issue in briefs filed in related proceedings, the Potawatomi responded that the assertion was irrelevant and not accurate.[19] C&L has never offered any evidence in support of this allegation which is irrelevant and not true in any event.

The basis for the state court's exercise of jurisdiction over the Potawatomi in the C&L case is not the arbitration paragraph nor the alleged funding of the project, but rather the *Hoover* decision that Indian tribes waive sovereign immunity by engaging in commercial activity outside of Indian country. In any event, the arbitration clause cannot effect a waiver because the C&L agreement – including the arbitration clause – is void under *federal* law and the clause is not the clear and unequivocal waiver of tribal suit immunity required by federal law. *Bank of Oklahoma v. Muskogee (Creek) Nation*, 972 F.2d 1166, 1169, 1171 (10th Cir. 1992).

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[19] *See e.g.* Reply Brief of Appellant at 13, *Citizen Potawatomi Nation v. Freeman*, No. 96-6279 (10th Cir. Dec. 13, 1996).

CONCLUSION

The petition for certiorari should be granted and the District Court judgment for the Respondent should be reversed with directions to dismiss the suit for lack of jurisdiction.

Respectfully submitted,

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